2004

Provo City v. James Luis Gedo : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

PROVO CITY, Plaintiff/Appellee, vs. JAMES LUIS GEDO, Defendant/Appellant.	Case No. 20040225-CA

BRIEF OF APPELLANT

APPEAL FROM FOURTH JUDICIAL COURT, UTAH COUNTY, PROVO CITY CONVICTION OF RESISTING OR INTERFERING WITH AN OFFICER IN THE DISCHARGE OF DUTY, A CLASS B MISDEMEANOR, BEFORE THE HONORABLE DEREK P. PULLAN.

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PRIORITY TWO
APPELLANT NOT
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellant, vs. JAMES LUIS GEDO, Defendant/Appellee.	Case No. 20040225-CA

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated § 78-2a-3(2)(e) (Supp. 2001).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether the trial court erred when it basically ignored pro se motions filed by the Defendant for more than a year, then, after ordering the City to respond to the motions, and ordering that Provo City comply with the Rules of Civil Procedure which require a response to a motion within 10 days, did not require the City to respond to all of the motions which had been filed and in fact simply denied the motions without full review. This issue was preserved for appeal by Gedo's several Notices to Submit and hearing on that issue held May 12, 2003.

2. Whether the trial court erred when it ordered that Defendant could not submit any of his own motions, as this may deny him his constitutional right to defend himself. This issue was raised by Defendant himself in the above hearing held May 12, 2003 and July 21, 2003.

3. Whether the trial court erred when it declined to find that the police officer's entry onto the property was illegal, and that his continued presence on the private property was a violation of the Defendant's 4th Amendment Rights. This issue was preserved in Defendant's Motion to Suppress held October 28, 2002 and Motion to Dismiss filed with the court and hearings held December 23, 2002.

4. Whether the officer's unjustified use of "deadly force," should result in a dismissal. Should a remedy for police misconduct include dismissal of criminal charges? A restriction of civil remedies for police misconduct denies an effective remedy for indigent defendants. This may be a novel constitutional issue for the Court to decide. This matter was preserved through the Defendant's own motions to the Court, not through motions made by his trial counsel. And is a matter that the court could decide should they desire to effect this remedy.

CONTROLLING STATUTORY PROVISIONS

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation,

and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of Utah, Article I Section 14

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

All other controlling statutory provisions and rules are set forth in the Addenda.

STATEMENT OF THE CASE

A. Nature of the Case

James Luis Gedo appeals from the judgment, sentence and commitment of the Fourth District Court after being convicted by a jury of one count of Resisting or Interfering with an Officer in the Discharge of Duty, a Class B Misdemeanor.

B. Trial Court Proceedings and Disposition

James Luis Gedo was charged by information filed in the Fourth Judicial District Court alleging that on or about August 14, 2001 he was charged with an Information alleging the offenses of Assault on a Police Officer, a Class A misdemeanor, a violation of § 76-5-402.1, Utah Code Annotated, 1953 as amended and Resisting or Interfering with an Officer in the Discharge of Duty a Class B misdemeanor, a violation of Section 9.10.030, Provo City Code. Gedo

was also charged with Disorderly Conduct, a Class C misdemeanor, although this charge was dismissed the day prior to jury trial in this matter.

On September 6, 2001 the Defendant appeared for arraignment before Judge Lynn W. Davis; with pretrial scheduled for October 30, 2001. Attorney Scott Card was appointed at that time to represent the Defendant. At the October 30, 2001 hearing attorney Scott Card stated he had a conflict in representing the defendant in this case and attorney Gary Chrystler was appointed and the Court found the Defendant indigent. On November 11, 2001, the Defendant appeared again for pretrial with attorney Gary Chrystler. Apparently Gedo had filed pro se motions with the Court which were not accepted and he was instructed at that time to file any motions through counsel. Motion hearing was scheduled for January 14, 2002.

On December 11, 2001 a Motion for Extension of Time to File Pre-Trial Motions and Request to Submit to Judge for Decision was filed. This motion for extension of time was granted. Subsequently, Gary Chrystler did file motions on the behalf of his client James Gedo on January 16, 2002 and February 21, 2002. These motions were handwritten motions made out by the Defendant, but re-typed and attached to a cover sheet which stated that the motions were filed at the request of the Defendant but against the advice of counsel. On April 23, 2002, Gary Chrystler appeared and requested to withdraw as conflict counsel, which was allowed by the Court.

The matter was next heard with new counsel, Laura H. Cabanilla, on May 20, 2002, but the matter was reassigned to Judge Guy R. Burningham in order to consolidate the Defendant's cases. On July 2, 2002 the matter was heard for pretrial conference and continued for further proceedings on August 26, 2002 at which time the court ordered discovery of police records involving the defendant for 5 years prior to the date of the offense.

On October 2, 2002 counsel for the Defendant filed a Motion to Suppress Evidence; a Motion in Limine; Defendant's Notice of Intention to Offer Statements of Unavailable Witnesses at Trial; as well as a Notice to Submit for Decision (on the motions which had been filed through Defendant's counsel Gary Chrystler).

The prosecution responded to the Motions to Suppress as well as the Motions in Limine with a memorandum filed October 24, 2002. However, the prosecution did not respond to the Notice to Submit on the Pre-Trial Motions of Defendant.

On October 28, 2002, the matter came before Judge Burningham for hearing. The court held that Defendant's counsel could amend her Motion to Suppress by filing it instead or more properly as a Motion to Dismiss, and refile the motion in limine to make it more specific, and the matter was scheduled for oral arguments.

A (now) Motion to Dismiss, Amended Motion in Limine, and again another Notice to Submit on the same motions previously filed by counsel Gary Chrystler was filed on November 22, 2002, still with no response to these motions ever being filed by the prosecution. Additionally, on November 21, 2002, defense counsel filed a Notice to Submit for Decision regarding Defendant's Notice of Intention to Offer Statements of Unavailable Witnesses at Trial, which had been filed October 1 2002 and not responded to by the City.

The Prosecution responded to the Motion to Dismiss, the Motion in Limine, and the Notice of Intention to Offer Statements of Unavailable Witnesses at Trial with memorandums in opposition filed December 12, 2002.

At hearing December 23, 2002, argument was taken regarding the Motion to Dismiss and Motion in Limine but those motions were denied. On February 13, 2003; February 20, 2003; March 24, 2003; April 14, 2003; and April 28, 2003, Defense counsel filed packets of motions received from the Defendant which she handled similarly to Gary Chrystler in that she attached them to a cover sheet which stated they were being filed at the request of the client but against the advice of counsel.

The Defendant filed his own motions, not through counsel, on February 13, 2003; and February 19, 2003. Also on February 19, 2003 hearing was held. Counsel for the Defendant raised the issue of the previous Notices to Submit and

the fact that the City had not responded. Provo City was instructed to file a response to the Defendant's motions by March 10, 2003.

The Defendant continued to file more motions on his own, not through counsel, which he filed on February 20, 2003. The City filed a response to Pre-Trial Motions of Defendant on March 11, 2003, which were the Pre-Trial Motions filed on February 13, 2003; however, did not respond to any of the other motions.

On March 24, 2003 hearing was held. The Defendant filed new motions with the Court on this day, and his counsel requested that the City respond to the motions or . The city was ordered to respond according to the rules, but the court granted the city's motion to continue and allowed more time to respond.

On May 12, 2003, hearing was held on all motions filed by the Defendant as well as other motions filed against counsel's advice but submitted through counsel. All motions were found to be not relevant and were stricken without a need for the City to respond. The court did grant one of the Defendant's motions – a request for a six month hiatus. The court ordered the Defendant not to file any more motions that were against the advice of counsel and the Defendant's counsel was ordered not to file motions unless she deemed them to have merit.

At this same May 12, 2003 hearing, the issue of Defendant's complaint and request that a remedy be available to him in the criminal case itself to address problems he had with the police. He was instructed at that time that he had civil

remedies available; that he could file a lawsuit if he believed he had been treated wrongfully (pps. 21 and 29 May 12, 2003 Transcript).

On July 21, 2003, the matter again came before the court on a motion to withdraw as Counsel filed by Gedo's counsel. After an agreement was entered into regarding client conduct, Laura Cabanilla agreed to stay on as counsel. At the same time an issue was raised in that the Defendant had been barred by the 4th District Court clerks in filing any motions with the Court, whether they were pleadings in this case or civil cases. The court stated the matter would be discussed at the next judge's meeting. (see notes entered in court computer docket for July 21, 2003).

Jury trial was then held January 21 and 22, 2004 in front of Judge Pullan. At the trial defendant was found Not Guilty of Assault on a Police Officer; but Guilty on Resisting or Interfering with an Officer in the Discharge of Duty. On February 9, 2004, Defendant was sentenced to statutory maximums on a Class B misdemeanor, with 20 days imposed and the remainder stayed. Defendant served this sentence and is not currently incarcerated.

On March 9, 2004 a timely appeal was filed.

STATEMENT OF RELEVANT FACTS

The circumstances surrounding the incident leading to the charges against Defendant were as follows: Defendant was a tenant in a house located at 363 West 800 North, Provo, Utah. The residence was a home which had been subdivided into separate apartments. Defendant lived in the basement apartment; while the upstairs apartment had previously been rented to two Russian individuals, Sergei Frolov, and Denis Mizenko.

James Gedo lived in the downstairs apartment that had an entrance on the west side of the building (p. 108, January 21, 2004 trial transcript).

There was testimony that the side patio area was intended by the landlord for the use of the upstairs renters; but there was also testimony that it was used by the downstairs tenant, Gedo, and that the outside areas including parking were used without distinction by both the upstairs and downstairs tenants and that the lease for the downstairs tenants made no specifications that they could not use the side patio (p. 107, 118, January 21, 2004; and p. 158 January 22, 2004 trial transcript).

They had not been current with their rent, and had been asked by the landlord to move out (p. 92, January 21, 2004 trial transcript).

The landlord believed they had been returning to the apartment through a broken window and had asked his brother to check on the residence (p. 95, January 21, 2004 trial transcript).

Earlier that day there had been a conversation between the owner and landlord of the property, Dane Kay, who told Gedo the problems he was having with the Russians, and that he did not want them at the residence (p. 103, January 21, 2004 trial transcript).

Gedo later testified that he allowed the Russians to visit with him on the side patio area as guests of his and that they were "back in the back, you know, just talking." (p. 157, January 22, 2004 trial transcript).

The landlord's brother Stacey Kay, had driven past the residence earlier, and had seen persons whom he believed to be the Russians on the property. He told his brother Dane Kay, who was the owner of the property, who testified that he then called the police and reported a trespass (p. 95, January 21, 2004 trial transcript).

Officer Rich Bunderson was dispatched and arrived at the property with the information of a possible trespass. He parked his vehicle several houses to the west of the property and approached. (p. 126, January 21, 2004 trial transcript).

As he did so, he shined his flashlight into the side-yard as he proceeded towards the front door of the property in order to speak with who he believed was the reporting party. (p. 127, 128, January 21, 2004 trial transcript).

In so doing he walked diagonally across the driveway, continuing to shine his light into the side patio area. (p. 128, January 21, 2004 trial transcript).

This patio was enclosed with a wrought iron fence on two sides, and a lattice on the west side and a covered roof. The south side had a half wall, with no lattice, although the lattice appears in a later photograph in this area. The patio was separated from a covered carport by an iron gate. (p. 126, 130, January 21, 2004 trial transcript). Leading to the carport is a driveway. The side yard itself, which surrounded the side patio, was completely enclosed by fencing.

At this time, the Defendant and the two Russian transients had been sitting in the side patio area. Officer Bunderson observed these individuals in the side patio, and shined his light towards them as he cut diagonally across the driveway towards the front upstairs door. (p. 128, January 21, 2004 trial transcript).

The Defendant became upset at the light shining and began to yell. (p. 128-130, January 21, 2004 pgs. 161-163 January 22, 2004 trial transcript).

The Defendant came out of the patio and into the carport or driveway area where he observed that the person shining a light was a police officer. (p. 131, January 21, 2004; p. 164-167 January 22 trial transcript). This however, only further upset Gedo and he began to demand that the police officer immediately leave the property. The officer did not leave. Officer Bunderson testified that the Defendant put his arm out towards the police officer as if to push him away (p. 132 January 21, 2004 trial transcript).

Officer Bunderson testified he struck the Defendant's arm out of the way. (p. 132-134, January 21, 2004 trial transcript).

There was conflicting testimony regarding this incident; with the Defendant denying that he made a move towards the officer. This action was the basis for the charge of assault on a police officer. When the case was given to the jury for deliberation, the jury found the Defendant not guilty of this charge. Officer Bunderson testified that at this point he drew his weapon (p. 134, January 21, 2004 trial transcript) because he saw an item in Gedo's hands that he thought might be a weapon. Upon realizing that the item was a set of keys (p. 135, January 21, 2004 trial transcript) he re-holstered his weapon and pulled out his pepper spray.

After that interaction, Gedo quickly turned and walked back through the gate into the enclosed patio area, closing the gate behind him (p. 138, January 21, 2004 trial transcript). The Officer testified that he had resolved to arrest Gedo at that point, (p. 138, January 21, 2004 trial transcript) and followed and pepper sprayed Gedo through the gate, then attempted to subdue and handcuff him (p. 140, January 21, 2004 trial transcript).

A second officer, Officer Mark Petersen, had received Officer Bunderson's call for assistance and arrived and observed Officer Bunderson in the side patio area attempting to restrain the defendant. (p. 143, January 21, 2004 trial transcript).

Both officers testified regarding difficulty in restraining Gedo. Officer Petersen's difficulty lay in the fact that he was holding a flashlight in his right hand, and had only his left hand free. Officer Bunderson testified that Officer Petersen struck the Defendant in the back of the head with a closed fist, (p. 147, January 21, 2004 trial transcript) which temporarily subdued Gedo and the officers were able to handcuff him. Officer Bunderson testified that as police officers they are taught to use the force reasonable to bring a person under control, and that strikes like this are intended to distract the person long enough to be able to control them" (p. 147, January 21, 2004 trial transcript).

However, Officer Petersen himself testified that he struck the Defendant in the back of the head with his flashlight, which immediately subdued the Defendant, and he was then easily handcuffed (p. 48 January 22, 2004 trial transcript).

The landlord Danny Kay testified that he later observed what appeared to be a bloody spot inside the gated side patio area (p. 197-199, January 21, 2004 trial transcript).

Gedo testified that this interaction clearly occurred inside the gated side patio area and that the bloody spot located inside it, was his own (p. 171 January 22, 2004 trial transcript).

Officer Petersen testified that he had seen Officer Bunderson struggling with the Defendant in the side patio area and in order to get to Officer Bunderson's location, he had jumped over the short fence located on the south side of the side patio (p. 31-33 January 22, 2004 trial transcript). This evidence showed that this interaction had occurred inside the gated side patio area.

The entire incident was observed by the two Russian transients, who were warned about trespassing on the property and released (p. 150, January 21, 2004 trial transcript).

Gedo was transported to the Utah Valley Regional Medical Center and given stitches by Dr. Keith Hooker (p. 173 January 22, 2004 trial transcript).

Dr. Hooker was unavailable at the time of trial; however a stipulation was reached and a statement was read to the jury that said the injury to Gedo was likely caused by being struck with a hard instrument having struck the defendant and that the injury was not consistent with being struck by a closed fist, even one holding a hard object (Exhibit 5, p 47 January 22, 2004 trial transcript).

After being provided with medical treatment, Gedo was transported to the Utah County Jail.

SUMMARY OF ARGUMENT

The Defendant James Gedo is an individual who insists on "tilting at windmills," he is an often prickly and difficult person, and has certain disabilities which were testified about at trial. This results in him often being at odds with the police, the courts, and even his appointed counsel. However, no matter how difficult he may be, or even how difficult he may at time even make things for himself, he is still entitled to equal protection under the law.

The Defendant filed pro se motions, and other motions under a cover sheet through his attorney. The prosecution and the trial court ignored thee motions, which is plain error for the trial court. The trial court erred when it basically ignored pro se motions filed by the Defendant for more than a year, then, after ordering the City to respond to the motions, and ordering that Provo City comply with the Rules of Civil Procedure which require a response to a motion within 10 days, did not require the City to respond to all of the motions which had been filed and in fact simply denied the motions without full review. This issue was preserved for appeal by Gedo's several Notices to Submit and hearing on that issue held May 12, 2003.

Also, the trial court erred when it ordered that Defendant could not submit any of his own motions, as this denied him his constitutional right to defend himself.

Further, Gedo was the tenant of property which he legally possessed, and had guests which the landlord did not want at the property. The landlord called police regarding a trespasser, and when the officer arrived to investigate, was immediately, clearly, repeatedly, and in no uncertain terms, was told to leave the property. The officer did not do so and remained on the property. The trial court erred when it declined to find that the police officer's entry onto the property was illegal, and that his continued presence on the private property was a violation of the Defendant's 4th Amendment Rights.

Gedo's last argument, is that the exclusionary rule should be expanded to include a dismissal of charges where police misconduct consists of police brutality. A restriction of civil remedies for police misconduct denies an effective remedy for indigent defendants. This may be a novel issue for the Court to decide. This matter was preserved through the Defendant's own motions to the Court, not through motions made by his trial counsel. If the Court finds that it could expand the exclusionary rule to include instances of police brutality, rather than only a rule that excludes use of evidence seized illegally, it should remand this case for

hearing and findings of fact on the issue of whether there was police misconduct in this case.

ARGUMENT

POINT I

THE TRIAL COURT SHOULD HAVE REQUIRED THE PROSECUTION TO COMPLY WITH THE RULES OF PROCEDURE WHICH REQUIRE A RESPONSE TO A MOTION WITHIN 10 DAYS; SHOULD NOT HAVE IGNORED NOTICES TO SUBMIT REGARDING THESE MOTIONS AND THEN FINALLY DENYING THE MOTIONS WITHOUT A FULL AND FAIR REVIEW.

Previous to the trial, Defendant had requested that numerous motions be filed with the Court. Counsel for the Defendant, and the Defendant's previous counsel, Gary Chrystler, handled these motions requested by the Defendant similarly, by simply attaching them to a cover sheet which stated that the motions were filed with the Court at the request of the client, but against the advice of counsel.

The City of Provo never responded in writing to these motions, except for one set of motions, as further detailed below. On October 18, 2002, counsel for Defendant filed a Notice to Submit, stating that motions filed January 16, 2002, and February 21, 2002 by the Defendant's previous attorney, Gary Chrystler, had never been responded to by the City of Provo. In these Notices to Submit, Defendant requested a decision by the Court regarding those motions. On December 23, 2002, the matter came before the Court for hearing. Defendant's

counsel requested the Court rule on the Notice to Submit which had been filed October 2, 2002. The Court ruled, denying each request.

The Defendant continued to request that his counsel file various motions on his behalf, and Defendants counsel continued to file motions of this sort, calling the pleadings "Pre-Trial Motions of Defendant," with a cover stating that the motions were filed against the advice of counsel. This was done on February 12, 2003; February 19, 2003; March 23, 2003; April 14, 2003; April 22, 2003; and May 7, 2003. The Defendant had also filed additional motions on his own, not through counsel.

Again, Provo City never responded to these pre-trial motions of Defendants. When the matter was again before the court for pretrial hearing on February 18, 2003, counsel again raised the issue of the un-responded to motions and requested a dismissal of the case because of the lack of response. On that date the Court ruled that the City was to file a response by March 10, 2003. Provo City filed a response on March 11, 2003, but only to the set of motions filed February 12, 2003.

This was the City's only written response to any of the pretrial motions which had been filed. On March 24, 2003, the matter came before the court on hearing, the court noted that new motions had been filed by the Defendant, the Court stated that the time for the City to respond to these motions was controlled

by the rules, but took no further action other than to continue the hearing to allow the City further time to respond. Provo City did not respond to the motions.

On May 12, 2003, the matter again came before the court on hearing, and the Court ruled that all motions filed by the Defendant were denied, finding them irrelevant, frivolous, and with no basis in law; however, the Court did grant one of Defendant's motions, which was his motion for a six month hiatus in the case. The Defendant was further instructed not to file any motions unless they were filed through his attorney; and the attorney was instructed not to file motions on Defendant's behalf unless they were made with the approval of counsel.

In fact, clerks of the 4th District Court at this time refused to accept any motions which the Defendant attempted to file, even going so far as to refuse to accept even pleadings in civil cases the Defendant attempted to file. This matter was raised in hearing in July 21, 2003 and is mentioned in the court computer docket.

Rule 7(b)(1) Motions, orders and other papers, Utah Rules of Civil Procedure, states that "an application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief sought." Gedo did meet this requirement with all of the series the motions filed by himself,

and those filed through his attorney but with the cover sheet which stated that they were filed against the advice of counsel.

Since the Defendant's various motions did set forth claims for relief, in accordance with Rule 8(a) URCP it would naturally follow that there should be some response to those claims for relief, and a failure of the City to respond to those claims for relief would be a failure to deny. Paragraph 8(d) URCP states that "[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." Therefore, a failure of the prosecution to respond and deny the claim for relief would mean that they were admitted.

The court reminded the prosecution that they needed to follow the Rules of Civil Procedure, yet when they did not do so, the Court allowed this and simply denied the motions.

Rule 7(3) Hearings on motions or orders to show cause. States that "When on the day fixed for the hearing of a motion or an order to show cause …." Which would suggest that hearing should be scheduled for a motion which is submitted to the court. However, hearing on these motions was not scheduled until three Notices to submit, many months, and requests from counsel for the Defendant.

POINT II

THE TRIAL COURT SHOULD HAVE ALLOWED THE DEFENDANT TO FILE ANY OF HIS OWN MOTIONS WITH THE COURT NOT FILED BY HIS ATTORNEY AS TO NOT ALLOW THIS IS AN INFRINGEMENT OF HIS CONSTITUTIONAL RIGHTS.

Rule 11 of the Utah Rules of Civil Procedure makes several requirements for pleadings, motions etc., which are filed with the court. Rule 11(b) states that by,

> "presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or later advocating), an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted b y existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

When Gedo's counsel simply filed his motions by attaching a cover sheet, which, although signed by the attorney, stated that the motions were filed against the advice of counsel, they were in effect, not certifying the motions as set out above. However, Gedo in his own motions did believe, to the best

of his knowledge information and belief that the motions were proper. However, for the Court simply to not allow Gedo to file motions, and even as occurred later, instruct their clerks not to accept any paperwork from the Gedos that did not come through an attorney, was improper and a violation of Gedo's constitutional right of access to the court. This was a violation of the 14th Amendment to the United States Constitution, which states that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

In response to the argument that Gedo could file motions through his attorney, or by himself if unrepresented, Section 12 Rights of Accused persons, Utah Constitution states that "In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel...." [emphasis added]. Therefore, Gedo should have been allowed the right to file motions on his own behalf, not necessarily only through counsel, and still receive the benefit of counsel. That he was not allowed to do this was a violation of his constitutional rights and the charges against him should be ordered dismissed.

POINT III

THE TRIAL COURT SHOULD HAVE FOUND THAT THE POLICE OFFICER'S ENTRY ONTO THE PROPERTY WAS ILLEGAL AND THAT HIS CONTINUED PRESENCE ON THE PROPERTY AFTER

BEING TOLD TO LEAVE WAS A VIOLATION OF HIS 4TH AMENDMENT RIGHTS.

The 4th Amendment of the U.S. Constitution, as well as Section 14 of the Utah constitution give person the right to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.

The Provo City Dispatch had received a call from Dane Kay, the actual landlord's brother, that there were trespassers on the property. Officer Bunderson was dispatched to investigate the trespass report, but knew very little details. He testified that as he approached from the west he observed individuals in the side patio area, which was an enclosed area, and assumed they were the trespassers. He had shown his light in the area and then approached what he thought was the front door of the reporting party or owner. Officer Bunderson testified that he was cutting diagonally across the driveway towards the front door as Gedo made contact with him. While it is commonly held that the open pathway to the front door is an implied invitation to members of the public to enter thereon, 4th Amendment of the U.S. Constitution, the other areas of the property are not open to the public and therefore are not open to a police officer. To enter thereon, or to remain after being asked to leave is a violation of the Defendant's 4th Amendment rights against unconstitutional searches and seizures.

Gedo was a legal tenant of the building. While there was testimony that the side patio was not part of the property leased to Gedo; there was also testimony that the lease did not specifically state that the side patio did not; and was used by all tenants of the house. As such, he is entitled to quiet enjoyment of his property and also has a right against unreasonable searches and seizures of his person or property, and a right to be secure in his person or house.

While there was testimony received from the landlord that he felt he had a right to allow the officer's intrusion; it is the tenant that has the 4th Amendment protection here.

When Gedo first approached the officer after having had a flashlight shown in his eyes and unable to see who this individual was, and then recognized that Officer Bunderson was a police officer he told him there was no problem at the residence and to leave. Officer Bunderson attempted to explain his presence; but Gedo was uninterested in his explanation and continued to insist that he leave. Officer Bunderson testified that he understood clearly that Gedo wanted him to get off the property. However, he did not do so, feeling that he needed to remain.

At what point in an interaction between a police officer and a private citizen, occurring on private property, must an officer leave the property even though he may be conducting an official investigation?

Perhaps the state may argue that exigent circumstances allowed the officer to continue his warrantless intrusion. In *State v. Ashe*, 745 P.2d 1255, the Court of appeals stated that "we begin our analysis with the understanding that searches conducted without a warrant *"are per se* unreasonable under the Fourth Amendment---subject only to a few specifically established and well-delineated exceptions."(fn7) The exceptions are "'jealously and carefully drawn,' and there must be a 'showing by those who seek exemption... that the exigencies of the situation made [the search] imperative.' "(fn8) Generally, exigency does not evolve from one individual fact. Instead, there is often a mosaic of evidence, no single part of which is itself sufficient. Our task is to review the totality of the facts and circumstances of the particular case to determine if the finding of exigency was proper.(fn9)

Here there was no concern that evidence could be lost, only that the person claiming that there was no problem and demanding that the officer leave could himself have been the trespasser. Dane Kay, the landlord, had not stated that he told dispatch there was a danger, or a prowler, but that there were squatters on the property. Officer Bunderson merely arrived on the scene ready to conduct an investigation. When he was told to leave, at that point he needed further information from dispatch as obviously he lacked even the most basic of information. There were no exigent circumstances. He needed only retreat and

marshal his facts to determine the next course. He certainly had insufficient evidence for a warrant.

Officer Bunderson testified that Gedo spoke in a very loud and angry voice using profanity. Use of profanity is speech protected by the First Amendment. The use of profanity is not a violation of the law, however, Officer Bunderson stated that it was this conduct that resulted in his decision to arrest Gedo for disorderly conduct.

In his testimony, Officer Bunderson testified that he did not understand who or what persons were trespassing and who Gedo was. He stated that he did not at any time call dispatch to request additional information on whom the complainant was, but he did begin a series of calls to dispatch to request assistance with Gedo.

Officer Bunderson testified that in his interaction with the Defendant, which occurred in the covered carport area of the residence, that the Defendant put his arm out towards the police officer as if to push him away. The officer struck the Defendant's arm out of the way. There was conflicting testimony regarding this incident; with the Defendant denying that he made a move towards the officer. Or may have simply been gesturing for the officer to leave. There was no conflict in testimony that the defendant never struck the officer. However, his action was the basis for the charge of assault on a police officer. (When the case was given to the jury for deliberation, the jury found the Defendant not guilty of this charge.)

Immediately after that interaction, Gedo quickly turned and walked back through the gate into the enclosed patio area, closing the gate behind him. Clearly signaling his intention to have no more contact with the police and to remain on his own private property, without welcome to the officer to follow.

Officer Bunderson testified that he was concerned that the defendant might join the others, or may go where there was a weapon; however, the possibility that a person" may have had a weapon, may have been retreating . . . to secure a weapon or the like," cannot justify a warrant less entry into a residence, *State v. Diaz*, 859 P.2d 19, 19 (Utah Appeals 1993). Here, simply because the officer may have been insulted and upset by the profanity and the rude treatment that he felt he received from the Defendant did not justify him in continuing to remain on the property without a search warrant. Officer Bunderson testified that he had resolved to arrest Gedo at that point, for disorderly conduct (which the State dismissed the day before trial) and for assault on an officer (which the jury acquitted the defendant) and followed Gedo to the gate, and pepper sprayed Gedo through the gate. Whereupon he opened the heavy iron gate and entered the separate side patio and attempted to subdue and handcuff him. The evidence that this next interaction, where the officers attempted to subdue Gedo, occurred fully inside the covered side patio, was basically uncontroverted. The second officer, Officer Mark Petersen, had received Officer Bunderson's call for assistance and

arrived and observed Officer Bunderson in the side patio area attempting to restrain the defendant. Officer Petersen testified that he had seen Officer Bunderson struggling with the Defendant in the side patio area and in order to get to Officer Bunderson's location, he had jumped over the short fence located on the south side of the side patio. The landlord Danny Kay testified that he later observed what appeared to be a bloody spot inside the gated side patio area. Gedo testified that this interaction clearly occurred inside the gated side patio area and that the bloody spot located inside it, was his own. This evidence showed that this interaction had occurred inside the gated side patio area. This area would have been given the same protections as the inside of a house, as it was separate, not open to the public and used as a living space, and was not curtillage.

POINT IV

THE COURT SHOULD FIND THAT AN OFFICER'S UNJUSTIFIED USE OF "DEADLY FORCE" OR OTHER POLICE MISCONDUCT SHOULD HAVE A REMEDY THAT RESULTS IN DISMISSAL SIMILAR TO THE EXCLUSIONARY RULE.

In *Weeks v. United States,* 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), *overruled in part by Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), *overruled in part by Stone v. Powell,* 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), the United States Supreme Court held, for the first time, that "'in a federal prosecution the Fourth Amendment barred the use of evidence

secured through an illegal search and seizure.'" *Mapp,* 367 U.S. at 648, 81 S.Ct. at 1688 (quoting *Wolf v. Colorado,* 338 U.S. 25, 28, 69 S.Ct. 1359, 1361, 93 L.Ed. 1782 (1949), *overruled by Mapp*). Forty-seven years later, in *Mapp v. Ohio,* the Supreme Court declared that the **exclusionary rule** also applied in state courts by holding "that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." *Mapp,* 367 U.S. at 655, 81 S.Ct. at 1691. Also, in Section **77-23a-7** Evidence – Exclusionary rule, Utah Code Annotated, the legislature has acted and made law that "when any wire, electronic, or oral communication has been intercepted, no part of the contents of the communication and no evidence derived from it may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision of the state, if the disclosure of that information would be in violation of this chapter."

The purposes of these efforts has been to provide a remedy for persons when the police misconduct has been such that it would be unfair for the prosecution to profit from the misconduct or illegally seized evidence and use it against the Defendant, and it was intended as public policy, to effect a remedy other than the ability to sue civilly for money damages.

When the policy has been attempted to be expanded in other ways, such as tax commission hearings or child protective hearings, the Court has held that that the **exclusionary rule** does not apply where the social costs outweigh the benefit of deterrence. *See In re A.R.,* 982 P.2d 73, 368 Utah Adv. Rep. at 35 (holding that the **exclusionary rule** does not apply to child protection proceedings).

As the exclusionary rule itself is intended for deterrence, if the value of deterrence does outweigh the social costs then it would be appropriate for something similar to the exclusionary rule to apply in cases where police misconduct, such as a beating given an arrestee by a police officer has occurred. Before the landmark cases of *Mapp*, the only remedy an individual had against illegal searches and seizures was simply to sue for damages in civil court. That is the current remedy that a victim of police brutality has—to sue in civil court for money damages. However, that remedy is insufficient, especially where a defendant is indigent, and may not be able to marshal the necessary facts to present a winning case in court. where counsel is not appointed on civil matters. While the remedy to sue for money damages should remain, it is appropriate that deterrence against police misconduct should exist in the very case or criminal charges that gave rise to the misconduct, just as they do with the seizure of illegal evidence.

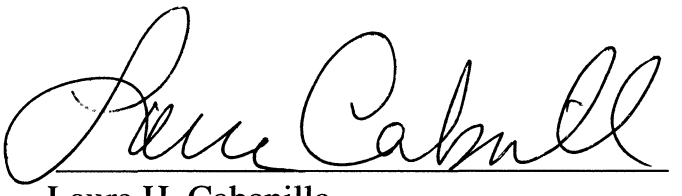
In this case there was evidence that the Defendant received a blow to the back of his head from the officer holding a flashlight in his hand, which would have been force in excess of what the officer's training taught them. While the evidence showed that Gedo was struggling with Officer Bunderson, and that Officer Bunderson was having difficulty in handcuffing him, this was because Officer Bunderson was using only one hand and a knee to attempt to bring him under control. There was no evidence that Gedo had a weapon, and other than struggling, had not struck the officer. While some amount of force would certainly appropriate, it is arguable that a strike to the head with a heavy flashlight was an excess of force.

While there are no factual findings from the court that there was police misconduct, that was not a question before the trial court. Were this Court to find that the exclusionary rule or a dismissal of charges is appropriate as a deterrent to police misconduct, this matter should be referred to the trial court for findings of fact as to whether Officer Peterson's actions constituted misconduct.

CONCLUSION AND PRECISE RELIEF SOUGHT

For the foregoing reasons, Gedo asks this Court to reverse his convictions for Resisting or Interfering with an Officer in the Discharge of Duty.

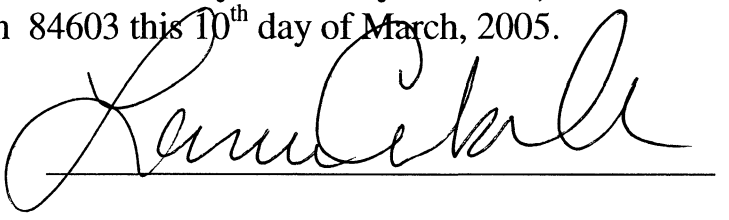
RESPECTFULLY SUBMITTED this 10th day of March, 2005.



Laura H. Cabanilla
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that I delivered two (2) true and correct copies of the foregoing Brief of Appellant to the **Provo City Attorney's Office,** 351 West Center, P.O. Box 1849, Provo, Utah 84603 this 10th day of March, 2005.



ADDENDA

Assault on a Police officer 76-5-102.4 Any person who assaults a peace officer, with knowledge that he is a peace officer, and when the peace officer is acting within the scope of his authority as a peace officer, is guilty of a Class A misdemeanor.

Assault 76-5-102

(1) Assault is:

(a) an attempt, with unlawful force or violence, to do bodily injury to another;

(b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or

(c) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.

(2) Assault is a class B misdemeanor.

(3) Assault is a class A misdemeanor if:

(a) the person causes substantial bodily injury to another; or

(b) the victim is pregnant and the person has knowledge of the pregnancy.

(4) It is not a defense against assault, that the accused caused serious bodily injury to another.

Provo City Ordinance Section 9.10.030 Resisting or Interfering with Officer in Discharge of Duty, a Class b misdemeanor interference with, resisted, molested or threatened a peace officer within the limits of Provo city, while in the discharge of his official duties or resisted a lawful arrest whether made by a peace officer or a private citizen.

Section 12 Rights of Accused persons, Utah Constitution states that "In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel…."

Rule 11, Utah Rules of Civil Procedure
presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or later advocating), an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(5) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the litigation;
(6) the claims, defenses, and other legal contentions therein are warranted b y existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
(7) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
(8) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Rule 8(a) URCP

Rule 7(b)(1) Motions